

# The Importer Doth Protest Too Much: Reconciling the Residual Jurisdiction of the U.S. Court of International Trade

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# **The Importer Doth Protest Too Much: Reconciling the Residual Jurisdiction of the U.S. Court of International Trade**

The U.S. Court of International Trade (CIT) was born of Congress' desire to promote uniformity and certainty in the application of the customs and trade laws. To this end, its principal innovation was the grant of residual jurisdiction to the court over matters concerning the administration and enforcement of those laws that were traditionally within the purview not of its predecessor tribunals but rather of the various district courts. However, since its creation the CIT and Federal Circuit have often interpreted this new authority to decline judicial oversight of certain customs and trade matters. Because importation is inherently dangerous, with importers having few Constitutional or other rights at the border, Congress has enacted various mechanisms to minimize that risk and maximize certainty. The courts' application of this residual power has resulted in importers being forced to use the traditional administrative protest system, for which their concerns may not have been designed, to preserve their options for review. That process requires greater effort and resources are spent before the merits of an importer's complaint are reached, if ever, by the court. As a consequence, many importers abandon meritorious claims due to the cumbersome process.

## 28 U.S.C. § 1581(a) and (i)

- (a) The Court of International Trade shall have exclusive jurisdiction of any civil action commenced to contest the denial of a protest, in whole or in part, under section 515 of the Tariff Act of 1930.

\* \* \*

- (i) In addition to the jurisdiction conferred upon the Court of International Trade by subsections (a)–(h) of this section and subject to the exception set forth in subsection (j) of this section, the Court of International Trade shall have exclusive jurisdiction of any civil action commenced against the United States, its agencies, or its officers, that arises out of any law of the United States providing for—
- (1) revenue from imports or tonnage;
  - (2) tariffs, duties, fees, or other taxes on the importation of merchandise for reasons other than the raising of revenue;
  - (3) embargoes or other quantitative restrictions on the importation of merchandise for reasons other than the protection of the public health or safety; or
  - (4) administration and enforcement with respect to the matters referred to in paragraphs (1)–(3) of this subsection and subsections (a)–(h) of this section.

# 28 U.S.C. § 1581(a) and (i)

19 U.S.C. § 1514(a):

Except as provided ... , any clerical error, mistake of fact, or other inadvertence, whether or not resulting from or contained in an electronic transmission, adverse to the importer, in any entry, liquidation, or reliquidation, and, decisions of the Customs Service, including the legality of all orders and findings entering into the same, as to—

- (1) the appraised value of merchandise;
- (2) the classification and rate and amount of duties chargeable;
- (3) all charges or exactions of whatever character within the jurisdiction of the Secretary of the Treasury;
- (4) the exclusion of merchandise from entry or delivery or a demand for redelivery to customs custody under any provision of the customs laws, except a determination appealable under section 1337 of this title;
- (5) the liquidation or reliquidation of an entry, or reconciliation as to the issues contained therein, or any modification thereof, including the liquidation of an entry, pursuant to either section 1500 of this title or section 1504 of this title;
- (6) the refusal to pay a claim for drawback; or
- (7) the refusal to reliquidate an entry under subsection (d) of section 1520 of this title;

shall be final and conclusive upon all persons (including the United States and any officer thereof) unless a protest is filed in accordance with this section, or unless a civil action contesting the denial of a protest, in whole or in part, is commenced in the United States Court of International Trade in accordance with chapter 169 of title 28 within the time prescribed by section 2636 of that title.

# Development of § 1581(i)

## Customs Courts Act of 1980:

“Subsection (i) is intended only to confer subject matter jurisdiction upon the court, and not to create any new causes of action not founded on other provisions of law.

“The purpose of this broad jurisdictional grant is to eliminate the confusion which currently exists as to the demarcation between the jurisdiction of the district courts and the Court of International Trade. This provision makes it clear that all suits of the type specified are properly commenced only in the Court of International Trade. The Committee has included this provision in the legislation to eliminate much of the difficulty experienced by international trade litigants who in the past commenced suits in the district courts only to have those suits dismissed for want of subject matter jurisdiction. The grant of jurisdiction in subsection (i) will ensure that these suits will be heard on their merits.” (H.R. Rep. No. 96-1235, at 47)

## *Miller* Rule:

“Section 1581(i) jurisdiction may not be invoked when jurisdiction under another subsection of § 1581 is or could have been available, unless the remedy provided under that other subsection would be manifestly inadequate.” (*Miller & Co. v. United States*, 824 F.2d 961, 963 (Fed. Cir. 1987))

## “True Nature” Rule:

“It is also true that a party may not expand a court's jurisdiction by creative pleading. As we have noted, ‘mere recitation of a basis for jurisdiction, by either a party or a court, cannot be controlling ... we look to the true nature of the action in the district court in determining jurisdiction of the appeal.’” (*Norsk Hydro Canada, Inc. v. United States*, 472 F.3d 1347, 1355 (Fed. Cir. 2006))

# Protections for Importers: Deemed Liquidation

One right Congress created, before the CIT was founded, to protect importers is deemed liquidation. Liquidation is the act by which the government fixes an importer's liabilities, and triggers in the importer the right to protest those liabilities. Historically, customs decisions such as appraisement and classification could be challenged at any time, and thus importers had full control over when to seek refunds. However, as the law developed such that a challenge could be lodged only after liquidation, importers lost that control and faced indeterminate periods of time in which their liabilities were unfixed and they thus faced legal exposure. The concept of deemed liquidation was thus introduced in 1978 to establish a limit on the time in which CBP must liquidate an entry and cordon an importer's otherwise infinite exposure. After one year, unless CBP acts first, the entry would liquidate as declared by the importer. Is the protest system, which is available only once liquidation occurs, intended as the exclusive means for vindicating this right that would be unnecessary once liquidation took place?

# Protections for Importers: Deemed Liquidation

19 U.S.C. § 1504(a)(1):

Unless an entry of merchandise for consumption is extended under subsection (b) of this section or suspended as required by statute or court order ... an entry of merchandise for consumption not liquidated within 1 year ... shall be deemed liquidated at the rate of duty, value, quantity, and amount of duties asserted by the importer of record. Notwithstanding section 1500(e) of this title, notice of liquidation need not be given of an entry deemed liquidated.

Customs Procedural Reform and Simplification Act of 1978:

“[U]nanticipated requests by Customs, many years after importation, for additional duties ... often result in substantial losses to importers because they are unable to anticipate such duties when pricing their products.”  
(S. Rep. No. 95-778, at 4)

# Protections for Importers: Deemed Liquidation

*Chemsol, LLC v. United States*, 755 F.3d 1345 (Fed. Cir. 2014):

- Challenged extension of liquidation for entries unliquidated after one year.
- Found no jurisdiction under § 1581(i) because (a) would be “available” and “adequate.”
- “[W]hen relief is prospectively and realistically available under another subsection of 1581, invocation of subsection (i) is incorrect.”

*Ford Motor Co. v. United States*, 811 F.3d 1371 (Fed. Cir. 2016):

- Challenged extension of liquidation for entries unliquidated after one year where entries were liquidated after case was commenced.
- Found jurisdiction under § 1581(i) but declined to consider case because (a) would be “more effective.”



# Protections for Importers: Preimportation Rulings

A second right Congress has developed since establishing the CIT to protect importers is the preimportation ruling. Although past practice is guidance as to how CBP will treat imported merchandise, an importer exposes itself to highly uncertain liability when entering merchandise because each entry is a new transaction unto itself and CBP has full discretion over the appraisement, classification, duty rate, or other quality to determine. To minimize such uncertainty, Congress has established a procedure by which an importer may request CBP to rule upon the quality with respect to a specific set of facts, which will predetermine the liability and reduce the importer's legal exposure. In 1993, in exchange for burdening importers with the requirement to exercise reasonable care in determining these attributes, Congress added language forbidding CBP from modifying or revoking a ruling without certain process. Could Congress have intended that the protest system be the means by which a ruling is enforced, when the ruling is meant to reduce the exposure in the first place?

# Protections for Importers: Preimportation Rulings

19 U.S.C. § 1625(c):

A proposed interpretive ruling or decision which would—

- (1) modify (other than to correct a clerical error) or revoke a prior interpretive ruling or decision which has been in effect for at least 60 days; or
- (2) have the effect of modifying the treatment previously accorded by the Customs Service to substantially identical transactions;

shall be published in the Customs Bulletin. The Secretary shall give interested parties an opportunity to submit, during not less than the 30-day period after the date of such publication, comments on the correctness of the proposed ruling or decision. After consideration of any comments received, the Secretary shall publish a final ruling or decision in the Customs Bulletin within 30 days after the closing of the comment period. The final ruling or decision shall become effective 60 days after the date of its publication.

## Customs Procedural Reform and Simplification Act of 1978:

Congress believes “importers must know the Customs Service interpretation of the law if they are to supply the Service with correct information in the first instance.” (S. Rep. No. 95-778, at 22)

## Customs Modernization Act of 1993:

Congress implemented “the concept of ‘informed compliance,’ which is premised on the belief that importers have a right to be informed about customs rules and regulations, as well as interpretive rulings, and to expect certainty that the Customs Service will not unilaterally change the rules without providing importers proper notice and an opportunity for comment.” (S. Rep. No. 103-189, at 64)

# Protections for Importers: Preimportation Rulings

*International Customs Products, Inc. v. United States*, 791 F.3d 1329 (Fed. Cir. 2015):

- Importer held a binding classification ruling
- CBP rate advanced and liquidated the entries despite the ruling
- No jurisdiction existed after liquidation because issue could be raised in a protest and inability to pay duties was not manifest inadequacy